No. 12,396

United States Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, et al.,

Appellees.

Appeal from the United States District Court, Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

February 15, 1950

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JURISDICTIONAL STATEMENT.

This case arises upon a bill of complaint for judicial review of compensation orders, filed pursuant to the provisions of section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; U.S.C., Title 33, Chapt. 18, sec. 901, *et seq.*), as made applicable to persons employed at certain defense bases by the Act of August 16, 1941 (55 Stat. 622; 42

U.S.C.A., secs. 1651-1654), hereinafter called "Defense Bases Act".

Section 21(b) of the Longshoremen's Act, *supra*, provides:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Section 3(b) of the Defense Bases Act, *supra*, provides:

> "Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs."

The office of the deputy commissioner, appellant, whose compensation order is involved is located in San Francisco, California, within the judicial district of the United States District Court for the Northern District of California, Southern Division.

Jurisdiction of this Court upon appeal is invoked under sec. 1291, Title 28, U. S. Code.

STATEMENT OF CAUSE.

First accident.

On December 2, 1941, Fred F. Laird, the claimant, injured his back in the course of his employment on Johnston Island in the Pacific Ocean while assisting to lift a derrick weighing 1200 to 1500 pounds (Transcript 134). The injury consisted of an incomplete rupture of the nucleus pulposus which injury was insufficient of itself permanently to disable him (T. 129, 130); this first injury was sustained while claimant was employed by the appellee, Contractors, Pacific Naval Air Bases, for whom the appellee Liberty Mutual Insurance Company was the compensation insurance carrier.

Second accident.

On January 13, 1942, claimant again injured his back while assisting in moving a studding form at Pearl Harbor when his foot slipped on an oil spot (T. 137); this second injury occurred while he was employed by the appellee Builders, Pearl Harbor Dry Dock No. 4, also referred to as Pacific Bridge Company (T. 136) for whom the appellee United States Fidelity & Guaranty Company was the compensation insurance carrier.

The first injury "caused a beginning weakness of the ligaments supporting the nucleus and the second

injury completed the relaxation of the ligaments. These two injuries together resulted in such a relaxation of the ligaments supporting the nucleus that a gradual complete rupture occurred." (T. 130).

On July 9, 1942, an operation was performed on claimant's spine at which time the ruptured nucleus was removed and a fusion was done of the 4th and 5th lumbar vertebrae (T. 83).

The two compensation awards.

Separate claims for compensation benefits were filed with the deputy commissioner against both employers for both injuries and were consolidated by the deputy commissioner for *hearing purposes.* On November 4, 1942, the deputy commissioner filed a separate compensation order in each case (T. 22, 46). In said compensation orders the deputy commissioner found in substance that the employee sustained *two injuries* to his back, one while in the employ of Contractors, PNAB which disabled him from December 5, 1941, until December 12, 1941; the other injury on January 13, 1942, while employed by Builders, Pearl Harbor Dry Dock No. 4, which was superimposed upon the prior disability and *added to the disability* from which he was suffering from the first injury (T. 24, 48). *No appeal was taken from said orders.* The deputy commissioner further found that claimant was totally disabled from December 5, 1941, to December 12, 1941, and directed the first employer, Contractors, PNAB and its insurance carrier to pay compensation for that period (T. 24). The deputy commissioner made a

further finding in said orders that the disability following the second injury was the combined effect of the two injuries and directed that each employer pay one-half of the weekly compensation (T. 25, 49), i.e., $12.50 per week each, for a total compensation of $25.00 per week.

Proceedings to limit liability.

When the insurance carriers of the two employers had each paid only $3,750 (that is $7,500 combined) they petitioned the deputy commissioner to terminate their respective liabilities under sec. 14(m) of the Longshoremen's Act, 33 U.S.C. sec. 914(m). Said section as it existed at the time of the injury provided:

> *"The total compensation payable under this act for injury or death shall in no event exceed the sum of $7,500."*

The deputy commissioner denied said petitions, holding that each of the employers was liable for the maximum of $7,500 provided by the statute, by reason of the two separate injuries resulting from the two separate accidents in the two separate employments.

Appellees then brought this proceeding for judicial review contending that said orders are not in accordance with law and beyond the deputy commissioner's jurisdiction "in that the $7,500 maximum applies to all awards to a single claimant, under the act, regardless of how many employers or injuries are involved, especially where the two injuries are closely connected in time and result in a single disability for which liability is apportioned" (T. 5).

Trial court redetermines the facts.

The learned trial Court thought it unnecessary to decide whether the statutory maximum liability applies regardless of the number of injuries which an employee sustains in different employments (T. 9); it determined there was but *one injury* (contrary to the findings of fact of the deputy commissioner in the compensation orders of November 4, 1942, *which had long since become final* and not subject to judicial review) (T. 11-12). Having thus determined one injury, the Court below decided that the maximum amount payable in this case had been paid and ordered that compensation be terminated (T. 13).

Questions involved in this appeal.

1. *Did the trial Court have jurisdiction to set aside the deputy commissioner's findings of fact that claimant had sustained two injuries, and substitute its own finding that there had been but one injury, when:*

(a) *the deputy commissioner's findings had long since become final;*

(b) *it was the exclusive province of the deputy commissioner to determine factually whether there was one or more injuries?*

2. *Does the limitation of total compensation payable under the Act apply to all awards to one employee during his lifetime regardless of the number of employers or the number of injuries?*

SPECIFICATION OF ERRORS.

The court below erred (1) in redetermining the question of whether there was one or more injuries; (2) in failing to grant appellant's motion to dismiss the complaint.

SUMMARY OF ARGUMENT.

Section 21(a) of the Longshoremen's Act, 33 U.S.C. sec. 921 (a) provides that all compensation orders shall become final upon the expiration of 30 days unless a proceeding for judicial review is instituted within that time. No such proceeding was commenced to review the compensation orders of November 4, 1942. Consequently said orders (and all the findings contained therein) became final on December 4, 1942. Therefore, the finding of the deputy commissioner in said orders to the effect that claimant sustained two injuries had long become final and could not be judicially reexamined in a proceeding commenced in 1948.

In addition, it is an established principle of administrative law that a finding of fact supported by evidence is not subject to redetermination by the reviewing court. Whether there was one or more injuries and the nature and extent thereof is a question of fact within the exclusive province of the trier of facts.

Since the findings in the compensation orders of two injuries were beyond review, the court below should have decided the legal questions involved,

namely, whether the $7,500 limitation of liability for injury or death applies to each employer, or to all injuries which an employee may suffer during his lifetime in all his employments. We maintain that the learned trial court should have decided that the $7,500 limitation of liability applies separately as regards separate injuries arising from separate employments.

ARGUMENT.

I.

(a) THE FINDINGS THAT CLAIMANT SUSTAINED TWO INJURIES HAD LONG BECOME FINAL AND WERE NOT SUBJECT TO JUDICIAL REVIEW.

The findings with reference to the nature and extent of the injuries and particularly that there were two injuries were contained in the compensation orders filed by the deputy commissioner on November 4, 1942. (There were no similar findings in the compensation orders filed in December, 1948, which are the subject of this review.) No proceeding for judicial review of the compensation orders of November 4, 1942, was ever instituted. Under the provisions of section 21(a) of the Longshoremen's Act, 33 U.S.C. sec. 921(a), the orders of November 4, 1942, became final on December 4, 1942. *Pillsbury, deputy commissioner v. Alaska Packers Association,* 85 F. (2d) 758 (C.A. 9, 1936); reversed on other grounds 301 U. S. 174; *United Fruit Company v. Pillsbury, deputy commissioner,* 55 F. (2d) 369 (Calif. 1932); *Associated*

Indemnity Corporation, et al. v. Marshall, deputy commissioner, 71 F. (2d) 235 (C.A. 9, 1934), rehearing denied July 19, 1934, 71 F. (2d) 420; *Didier v. Crescent Wharf & Warehouse Co.,* 15 F. Supp. 91 (Calif. 1936); *Mille v. McManigal, deputy commissioner,* 69 F. (2d) 644 (C.A. 2, 1934); *Campbell v. Lowe, deputy commissioner,* 10 F. Supp. 288 (N.Y. 1935); *W. R. Grace & Co. v. Marshall, deputy commissioner,* 56 F. (2d) 441 (Wash. 1931); *Shugard v. Hoage, deputy commissioner,* 67 App. D.C. 52, 89 F. (2d) 796 (App. D.C. 1937); *Swofford v. International Mercantile Marine Co.,* 113 F. (2d) 179 (App. D.C. 1940); *Tudman v. American Shipbuilding Company,* 170 F. (2d) 842 (C.A. 7, 1948); *Gravel Products Corp. v. McManigal, deputy commissioner,* 14 F. Supp. 414 (N.Y. 1936). Therefore when the court below set aside the deputy commissioner's finding of fact that there were two injuries, it exceeded its jurisdiction.

In the case of *Pillsbury, deputy commissioner v. Alaska Packers Association, supra,* 85 F. (2d) 758, the deputy commissioner, on February 1, 1930, filed a compensation order in which one of the findings was that claimant was an employee within the meaning of the Act; no proceeding for a review was instituted and the order became final upon the termination of 30 days. Subsequently the employer made an application for review under section 22 of the Act, which the deputy commissioner denied. In a proceeding for judicial review brought in the United States District Court under section 21(b) of the Act, the employer

sought to have reviewed the finding that claimant was an employee, which finding was contained in the compensation order of February 1, 1930. This court stated:

> "Section 21 of the act (33 U.S.C.A. sec. 921) provides that a compensation order shall become final after 30 days, unless proceedings for its abrogation are instituted in the District Court within that time. *Associated Indemnity Corporation v. Marshall,* (C.C.A. 9) 71 F. (2d) 235, 236; Id. (C.C.A.) 71 F. (2d) 420. In view of that provision, and particularly under the record made out in this case, to permit the jurisdictional fact of employment to be questioned 20 months after the original compensation order would, we think, result in frittering away the purpose of the Longshoremen's and Harbor Workers' Compensation Act."

In the case at bar the period of time is 72 months after the original compensation orders.

The above holding is consistent with the decisions in other circuits upon the same point. The courts have uniformly held that the language in section 21 means what it says, namely that an order (and necessarily the findings which comprise the order) becomes final upon the expiration of the thirtieth day unless a proceeding for judicial review is brought within that time. *Gravel Products Corp. v. McManigal, deputy commissioner, supra,* 14 F. Supp. 414 (N.Y. 1936).

(b) EVEN IF THE FINDINGS THAT THERE WERE TWO INJURIES HAD NOT BECOME FINAL, THE COURT COULD NOT SUBSTITUTE ITS FINDING FOR THOSE OF THE DEPUTY COMMISSIONER.

In *Marshall, deputy commissioner v. Pletz,* 317 U.S. 383, 388, the court stated that "under the overwhelming weight of authority in this and in the lower federal courts" the statute granted no power to the District Court to make new or independent findings of fact. The findings of fact of the deputy commissioner, supported by evidence, are final and conclusive and not subject to judicial review: *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Benson,* 285 U.S. 22 (1932); *Jules C. L'Hote v. Crowell, deputy commissioner,* 286 U.S. 528 (1932); 71 C. J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Cardillo, deputy commissioner v. Liberty Mutual Insurance Company,* 330 U.S. 469 (1947).

As was said by the Supreme Court in *Cardillo v. Liberty Mutual Insurance Co.,* 330 U.S. 469, 478 (1947), in a general summary on this point:

> "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm v. Commissioner,* 326 U.S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner

alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio v. Bowers, supra,* 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor Board v. Hearst Publications,* 322 U.S. 111, 131; *Commissioner v. Scottish American Co.,* 323 U.S. 119, 124; *Unemployment Compensation Commission v. Aragon,* 329 U.S. 143, 153-154. Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only 'If not in accordance with law.' "

The courts uniformly hold that whether there was one or more injuries is a question of fact. *Prince Chevrolet Co. v. Young,* 187 Okla. 253, 102 P. (2d) 601 (1940); *Head Drilling Co. v. Industrial Accident Commission,* 177 Cal. 194, 170 P. 157; *Mahoney v. Utility Roofing Co.,* 45 N.Y.S. (2d) 746 (1944) aff'd. 293 N.Y. 915, 60 N.E. (2d) 127; *Garcia v. J. C. Penney Co.,* 52 N.M. 410, 200 P. (2d) 372 (1948); *Highway Insurance Underwriters v. Stephens,* 208 S.W. (2d) 677 (Tex. 1948).

Typical of the statements made by the courts in the cited cases is that in *Prince Chevrolet Co. v. Young, supra,* 102 P. (2d) 601, 187 Okla. 253:

> "As to whether the disability resulted from a prior injury or is an aggravation of a prior injury or is caused by a new and independent injury, is a question of fact solely within the province of, and for the determination of, the State Industrial Commission and if there be any competent evidence to sustain the finding, an award based thereon will not be disturbed." (citing cases)

The court below therefore erred when it reexamined the deputy commissioner's findings of fact that there were two injuries, and substituted therefor the court's own determination that there was but a single injury.

II.

(a) AN ANALYSIS OF THE ACT AS A WHOLE SHOWS THAT SECTION 14(m) RELATES TO THE LIMITATION OF LIABILITY OF THE EMPLOYER AND NOT TO ANY LIMITATION OF COMPENSATION RECEIVABLE BY THE EMPLOYEE.

This cause involves an interpretation of Section 14(m) of the Longshoremen's Act, 33 U.S.C. Sec. 914(m). However, it appears to us that the answer to the question before the court must be determined by an analysis of the act as a whole, in order to reconcile apparent inconsistencies and produce a uniform interpretation and application.

It must be recognized that every Act of Congress, or completed system of legislation, is a product of divergent views. When the act or legislation is finally passed, it represents the best attempt of that moment to satisfy all interested parties and to protect their vital interests, insofar as possible to do so without infringing upon vital interests of other groups. In doing this the Congress or any legislature will adopt varying provisions of an act designed to satisfy the interests of varying groups. To understand a particular provision of an act, it is, we believe, desirable to look at what the provision was designed to accomplish and to examine it from the point of view of the group in whose interest it was created.

The basic purpose of the Longshoremen's Act is to provide compensation for injuries to maritime employees, as the title of the act so states. Act of March 4, 1927 (c. 509, 44 Stat. 1424). In order to carry out the purpose of the act a system of compensation was created, which, at the time it was passed, provided maximum compensation for total disability of $25 per week. Such compensation is set forth in Section 8(a) and (b) of the Act, which provides for weekly payments in cases of total disability *with no limit to the duration of time of such weekly payments.* The act clearly sets forth a scheme of indeterminate payments "during the continuance" of the total disability. Nor is there any purpose or intent or scheme in the act to limit the protection given the injured employee during the period of his total disability. Nor surely, does

anyone wish to do so. The totally disabled employee is entitled to receive all the compensation due him to the fullest extent of the act. For example, under Section 33(e), if third persons are liable in damages for causing the injury and a recovery is had, the excess over the amounts already spent by the employer go to the employee without limit. *Hitt v. Cardillo,* 131 F. 2d 233 (App. D.C. 1942). Thus, it may be seen that Section 8 is clearly related to the interests and protection of the employee and should be construed with that in mind.

In the same fashion, other provisions must be looked at from the point of view of the employer, and considered in the light of what they are expected to accomplish. Clearly, Section 14(m), as it existed at the time, was put in solely for the purpose of limiting the liability of the employer, and was designed to satisfy the interests of the employer group by putting a limit to the liability which the individual employer assumed in carrying on his business. The employee is not concerned with Section 14(m), except in a negative way. His interest is in the provisions creating compensation receivable by him, Section 7, relating to medical services, Section 8, relating to compensation for injury, and Section 9, relating to death benefits. The employee's interests are not related to Section 14(m); it is the employer's interests which are so related. The two meet only when the irresistible force of Section 8 runs into the immovable body of Section 14(m).

We conclude that Section 14(m) is an employer's provision of the act, was put in for his benefit, and should be looked at from his viewpoint. As so examined the provision is clearly and simply one of limitation of liability of the employer. It has no connection with compensation receivable by an employee.

The basic error made by the learned trial court in this cause was in looking at Section 14(m) from the viewpoint of the employee. It is not an *employee* provision at all. It is an *employer* provision.

That being so, Section 14(m) cannot be regarded as limiting the total amount of money receivable by an employee to $7,500. No such limits are contemplated by the act. Medical care may cause this amount to be exceeded, *Cardillo v. Liberty Mutual Co.,* 101 F. 2d 254 (D.C. Cir. 1938); death benefits may cause this amount to be exceeded, *International Mercantile Marine Co. v. Lowe,* 93 F. 2d 663 (2 Cir. 1938), 115 A.L.R. 896, cert. denied, 304 U. S. 565, *Norton v. Travelers Insurance Co.,* 105 F. 2d 122 (3 Cir. 1939), *Hitt v. Cardillo,* 131 F. 2d 233 (D.C. Cir. 1942), cert. denied, 318 U. S. 770; third party recovery may cause this amount to be exceeded, *Hitt v. Cardillo,* 131 F. 2d 233, 235 (D.C. Cir. 1942); and, we maintain, multiple injuries from separate employments may cause this amount to be exceeded, *Great Atlantic & Pacific Tea Co. v. Cardillo,* 127 F. 2d 334 (D.C. Cir. 1942), and cases hereinafter cited at pages 19-21. In the act itself there are no limits on the duration of time during which a totally disabled employee may receive com-

pensation for total disability. The limitation in the act is one of amount, viz., $25 per week.

As we have said, no one wishes to terminate the receipt of compensation for total disability by a wholly disabled employee. The sole motive for any limitation is that the employer does not wish to assume a liability infinite in time and amount. His legitimate interest is in a maximum limitation of the amounts *payable* by him. Accordingly, the sole scope and function of the provision is to define the maximum liability assumed by the individual employer.

That being so, the fact that an employee has recourse to more than one employer, as does Laird in this case, and as a result is able to have the duration of time of his compensation for total disability continue longer than would otherwise be the case, is wholly fortuitous, and is completely immaterial to the employer's legitimate interests under Section 14(m). Until the employer individually has paid out $7,500 as compensation for injury, there is no occasion for Section 14(m) to come into play. The design of the section is not to cut off the duration of weekly compensation received by the totally disabled employee, but to perform the totally different function of limiting the liability of the employer to a fixed amount.

The wording of Section 14(m) bears this out. It specifically uses the phrase "compensation payable",[1]

[1] "(m) The total *compensation payable* under this Act for injury or death shall in no event exceed the sum of $7,500." (Italics added.)

and not the phrase "compensation receivable", as would have been the case if the provision had been concerned with what is receivable by the employee.

Basic error of trial court.

The learned trial court erred in conceiving Section 14(m) as essentially a restriction of benefits receivable by a wholly disabled employee, rather than as a provision limiting the liability of the individual employer.

For example, the trial court's opinion posed the issue as "whether Section 14(m) states the maximum compensation an employee can *receive* for each separate injury or, as the plaintiffs urge, the maximum he may *receive* for all injuries in the course of his industrial life" (italics added) (T. 9). Yet the section is not related to what the employee *receives* but to what the employer *pays*. We submit this basic misconception led the learned trial court into the error of ignoring the plain mandate of Section 8 which provides for indeterminate monthly payments to the wholly disabled employee, to be terminated only on the termination of the disability or when the employer's liability has been exhausted. In short, the court erroneously construed the section as one of compensation and not as one of liability.

(b) THE DEPUTY COMMISSIONER PROPERLY HELD THAT EACH INJURY AND RESULTING DISABILITY MAY BE AN INDEPENDENT BASIS FOR LIABILITY OF SEPARATE EMPLOYERS FOR SEPARATE INJURIES ARISING FROM SEPARATE ACCIDENTS.

It is our position that two separate injuries resulting from two separate accidents in two separate employments may give rise to two separate liabilities, so as to extend the duration of time during which the totally disabled employee is protected by the act. Note that the maximum weekly compensation, $25 per week, is not affected and remains the same in amount.

The few authorities directly in point appear to support our position that each injury creates its own independent liability to pay compensation and that the limits of the act are limits of liability of the employer.

Oklahoma.

The Oklahoma workmen's compensation law in 85 O.S. 1941, Section 22, provides:

> "In case of total disability adjudged to be permanent sixty-six and two-thirds per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability *not exceeding five hundred weeks.*" (Emphasis supplied.)

The Supreme Court of Oklahoma in *Bendelari v. Kinslow,* 192 Okla. 390, 136 P. (2d) 918 (1943) stated, in a case where a subsequent accident was shown responsible for a part of the injury:

"By reason of this provision an injured workman, who is entitled to compensation under the act, is limited by the maximum number of weeks provided, to wit: 500 weeks *for any one accident* resulting in compensable injuries or disability. *The maximum limitation provided does not apply in a case of the occurrence of separate and distinct accidents.*" (Emphasis supplied.)

New York.

In *Berner v. Caruso,* 233 N. Y. 614, 135 N. E. 940, the New York Court of Appeals affirmed an award of the State Industrial Board in a case where a derrick had fallen upon an employee in 1917, resulting in traumatic hysteria for which he was awarded compensation in a lump sum ($5,000), which covered a period extending to March, 1924. The employee recovered his health and went to work as a carpenter. On July 30, 1920, three and a half years after the first accident, he sustained another injury. This second accident resulted in psychoneurotic conditions similar to those resulting from the first accident. The board awarded compensation to the employee on a temporary total basis, *notwithstanding the fact that at the time of the second injury he had received compensation benefits for almost four years beyond the date of the second accident.*

Indiana.

In *Hollerbeck v. Blackfoot Coal Corporation,* 113 Ind. App. 614, 49 N. E. (2d) 973 (1943), it was held that a limitation of $5,000 in the Act applies to *one accident* and is not the amount which an employee

may receive for all injuries in the course of his industrial life. Accord: *Asplund Construction Corp. v. State Industrial Commission,* 185 Okla. 171, 90 P. (2d) 642 (1939) which, like the instant case, related to two successive back injuries.

No others found.

We do not know of any authority which holds that "the total compensation payable under this Act for injury or death" refers to the amount payable for several injuries combined as though they were one. Looking at section 14(m) of the act (33 U.S.C. 914(m)) as it existed prior to amendment in 1948 (this case having arisen prior to such amendment) we see that the text refers to "injury" not "injuries." The inference of the wording is that the limitation provision relates to a single separate injury, and not to all injuries suffered during a lifetime.

Practical considerations.

There are compelling reasons why the limitation on maximum compensation as provided in the act should apply separately to disability flowing from two separate injuries, whether it is the back which is injured on both occasions, or whether it is the back on one occasion and another part of the body on another. Assume that an employee injured his back in 1940 to such an extent that he could earn only 50 per cent of his former wage. Assume that he was entitled to compensation at the maximum rate of $25 per week until the sum of $7,500 had been paid. At the end of

approximately 5.7 years (in 1945 or 1946) the total amount would have been paid. If this same employee then sustained a second injury to his back which completely disabled him, he would not, according to appellees' contention concurred in by the learned trial court, *be entitled to any compensation for the new injury,* since both accidents resulted in back injuries and combined to cause the total disability; under appellees' theory the employer at the time of the second injury would pay nothing. We submit such a construction would be totally unreasonable, and that no court would deprive the employee of compensation for his second injury. And merely because two injuries occur close together in point of time, or because the injured employee files claims for compensation against his respective employers approximately at the same time, or because for convenience both claims are heard together, is no cause to deny the employee compensation for a second injury.

In *Great Atlantic & Pacific Tea Co. v. Cardillo,* 127 F. (2d) 334 (D. C. Cir. 1942), the employer insisted that because it had paid the employee compensation for a period of five years under the temporary partial disability section of the act, it was not required to make further payments for a total disability growing out of a second injury originally compensated for by the employer under the theory of partial disability. The court rejected this contention and made its award solely on the basis of what happened subsequent to the second injury.

Where the successive injuries involve separate parts of the body the unreasonableness of limiting liability for two or more injuries is even plainer. For example, if the first injury affected the back and the second injury affected the leg, and if the employee has previously received the maximum compensation for his back, then, under appellees' theory, he would not be entitled to any compensation for his leg, even though the second injury consisted of the loss of the leg. To state the problem in such fashion is to answer it.

Liberal construction of Section 14(m) by the courts.

If we accept appellees' argument thaat $7,500 is the total compensation payable for more than one injury, the conclusion is inevitable that $7,500 is the total compensation for all injuries which an employee may sustain from his apprenticeship to the grave. Such a restricted interpretation of Section 14(m) of the Longshoremen's Act has been emphatically rejected by the courts. In *Norton v. Travelers Insurance Company,* 105 F. (2d) 122 (3 C.A. 1939), the court held that the provision in section 14(m) providing for a $7,500 total compensation for injury *or* death must be considered as separate liabilities arising out of the same injury, and that both the disabled employee and his dependents have the right to receive as disability and death benefits the maximum amount of $7,500 each. Accord: *Hitt v. Cardillo, deputy commissioner,* 131 F. (2d) 233 (App. D. C. 1942) cert. den. 318 U. S. 770; *International Mercantile Marine Co. v. Lowe,* 93 F. (2d) 663 (2 C.A. 1938), 115 A.L.R.

896, cert. den. 304 U. S. 565. Similarly, it was held that the $7,500 limit for injury or death does not include medical benefits. *Liberty Mutual Insurance Co. v. Cardillo, deputy commissioner,* 101 F. (2d) 254 (C.A. D.C. 1938). If, as these decisions hold, $7,500 is not the limit for all losses payable from *the same injury,* but that death benefits and medical benefits are in addition to disability benefits, then *a fortiori* the sum of $7,500 should not be the limit payable for *several* injuries arising from separate accidents while in the employ of separate employers.

Liberal construction favored.

Assume for the sake of argument that section 14(m) of the Longshoremen's Act admits of two constructions. It has been uniformly stated that the act should be construed liberally and in favor of the wholly disabled employee wherever possible. *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D. C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc. v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C. A. 4, 1934), cert. den. 293 U. S. 581.

Opinion of court below.

The court below was of the opinion that each separate injury should not be compensated to the statutory limit, because in such event in occupational disease

cases "many, if not innumerable physical events, may be in the stream of causation" and "to interpret section 14(m) to mean that the maximum compensation stated should be multiplied by the number of events contributing to the disease would be completely unreasonable", and that "it is equally so when the bodily damage is of traumatic origin, even though in the latter case, the events contributing to the damage may be more discernibly separable" (T. 11).

No cause for alarm.

A short answer is that the maximum compensation remains at $25 per week, irrespective of the number of injuries.

But more specifically, this allusion to the effects which would follow an attempt to apply the statutory limitation to each injury will not stand analysis. It is the occupational disease itself and not the "many events" culminating in the occupational disease which is included in the term injury *by legislative definition* (Sec. 2(2), 33 U.S.C., sec. 902(2)). Hence, there would be only *one* injury, the occupational disease itself. Consequently, the problem posed by the trial Court in occupational disease cases could never arise.

CONCLUSION.

The learned trial court had no jurisdiction to redetermine the number of injuries sustained, but was bound by the findings of the deputy commissioner

that there were two separate injuries. The deputy commissioner properly interpreted Section 14(m) as a provision relating to the liability of the employer and not to the compensation of the totally disabled employee and properly applied the limitation to separate injuries in separate employments. Accordingly, the compensation orders were in accordance with law, and the complaint should have been dismissed. We ask that the judgment of the district court setting aside the orders of the deputy commissioner be reversed, and that the cause be remanded to the district court with directions to dismiss the complaint. *Cardillo, deputy commissioner v. Liberty Mutual Insurance Co.*, 330 U. S. 469 (1947).

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Respectfully submitted,

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